

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of THERESA J. GODWIN and DEPARTMENT OF VETERANS AFFAIRS,
VETERANS ADMINISTRATION MEDICAL CENTER, Little Rock, Ark.

*Docket No. 95-1205; Submitted on the Record;
Issued August 21, 1998*

DECISION and ORDER

Before GEORGE E. RIVERS, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly reduced appellant's compensation to reflect her wage-earning capacity as a hospital admissions clerk.

The Board has reviewed the record and finds that the Office properly reduced appellant's compensation in this case.

On March 20, 1978 appellant, then a 49-year-old nursing assistant, filed a claim alleging that on that same date she sustained an injury to her low back while helping a patient into bed and while assisting another patient with a chair shower. The Office accepted the claim for a herniated nucleus pulposus and the resulting laminectomy which was performed on April 21, 1978. Appellant filed notices of recurrences of disability on May 21, 1979, August 21, 1980, June 17, 1981 and July 19, 1982. Appellant subsequently began receiving compensation for temporary total disability on the periodic rolls. In a letter dated September 15, 1994, the Office notified appellant that it proposed to reduce her compensation on the grounds that she had the capacity to earn wages as a hospital admissions clerk at the rate of \$193.60 per week. The Office finalized the reduction of compensation by decision dated October 19, 1994. In a decision dated January 20, 1995, the Office denied appellant's request for reconsideration.

Once the Office has made a determination that a claimant is totally disabled as a result of an employment injury and pays compensation benefits, it has the burden of justifying a subsequent reduction in such benefits.¹

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity. If the actual earnings do not fairly and reasonably represent wage-earning capacity, or if the employee has no actual earnings, her

¹ *Carla Letcher*, 46 ECAB 452 (1995).

wage-earning capacity is determined with due regard to the nature of her injury, her degree of physical impairment, her usual employment, her age, her qualifications for other employment, the availability of suitable employment, and other factors and circumstances which may affect her wage-earning capacity in her disabled condition.²

When the Office makes a medical determination of partial disability and of specific work restrictions, it may refer the employee's case to an Office wage-earning capacity specialist for selection of a position, listed in the Department of Labor's *Dictionary of Occupational Titles* or otherwise available in the open market, that fits the employee's capabilities with regard to his or her physical limitations, education, age and prior experience. Once this selection is made, a determination of wage rate and availability in the labor market should be made through contact with the state employment service or other applicable service.³ Finally, application of the principles set forth in *Albert C. Shadrick* will result in the percentage of the employee's loss of wage-earning capacity.⁴

With regard to appellant's physical restrictions, appellant was examined upon the Office's request on June 16, 1993 by Dr. William F. Blankenship, a Board-certified orthopedic surgeon, who reviewed appellant's history of injuries and treatment. He noted that appellant complained of pain in her back and legs, but that the pain was not constant. He recorded that appellant's back pain increased when she did household work involving standing or bending. Dr. Blankenship indicated that on examination appellant sat on the table without difficulty with her hips flexed at 90 degrees and both knees brought to complete extension. He stated that appellant could twist to the right and reach up overhead toward the right without difficulty. Dr. Blankenship did not find list, scoliosis or paraspinal muscle spasm when examining the lumbar spine. He noted that active flexion of the lumbar spine was to 85 degrees with reverse lumbar curve and that active hypertension was to 5 degrees. His examination of appellant's legs rendered normal results. Dr. Blankenship's review of the x-ray evidence revealed a narrowing of L5-S1. He opined that appellant was "capable of returning to at least light duty on a four-hour a day basis." He stated that he anticipated that appellant could gradually resume an eight-hour day with limited duty.

Dr. Blankenship also completed a work restriction evaluation indicating that appellant could perform intermittent sitting eight hours per day; intermittent walking, squatting and kneeling four hours per day; and intermittent standing two hours per day. He stated that bending, climbing and twisting was precluded, but that appellant could lift between zero 0 and 10 pounds. He stated that there were no hand restrictions, but that appellant could not reach or work above her shoulder.

Subsequently, Dr. Rex M. Easter, appellant's treating physician and a Board-certified orthopedic surgeon, indicated on September 28, 1993 that appellant had difficulty sitting and standing over an extended period of time. His examination revealed some mild restricted range

² See *Wilson L. Clow, Jr.*, 44 ECAB 157 (1992); see also 5 U.S.C. § 8115(a).

³ See *Dennis D. Owen*, 44 ECAB 475 (1993).

⁴ 5 ECAB 376 (1953); see also 20 C.F.R. § 10.303.

of motion of the lumbosacral spine with diminished hyperextension. He stated that flexion occurred to an estimated 80 percent and that appellant's leg tested normally. Dr. Easter's review of the x-rays revealed a marked decrease of the disc space of L5-S1. He opined that appellant remained totally disabled secondary to her accepted injury, but qualified this assessment to reflect that his opinion of temporary total disability hinged on the employing establishment's inability to find appellant a job within the restriction imposed by Dr. Blankenship.

The Board finds that the Office properly relied on the work restrictions provided on June 16, 1993 by Dr. Blankenship inasmuch as this physician relied on the results of his examination and the objective testing, and provided a medical rationale for his conclusion.⁵ Further, Dr. Easter stated that his assessment of temporary total disability was hinged on the inability of the employing establishment to place appellant in a position within "the restrictions imposed by Dr. Blankenship."⁶ Dr. Easter did not state that he disagreed with Dr. Blankenship's recommended medical restrictions. The job description for the selected position of a hospital admissions clerk indicates that it is a sedentary position with a maximum of 10 pounds lifting. There is no indication that the selected position is outside the restrictions as set forth by Dr. Blankenship.

As noted above, the selected position must not only be medically suitable, but also must be available in appellant's commuting area. In this case, the rehabilitation counselor indicated that the part-time position was reasonably available within appellant's commuting area. The record indicated that the rehabilitation counselor supported this conclusion by relying on the Arkansas State publication Arkansas ESD Division of Research and Development, *Industrial and Occupational Trends: 1990-2005 Arkansas*. This report was contradicted by the January 9, 1995 letter of Dr. Douglas A. Stevens, a vocational expert. He concluded that no jobs were available to appellant given her age and the fact that she needed part-time employment. Dr. Stevens did not explain how he arrived at his conclusion or reveal the resources he utilized in reaching his assessment.⁷ Accordingly, the report of the rehabilitation counselor constitutes the weight of the evidence and establishes that the position is reasonably available within appellant's commuting area. Moreover, the record indicated that the selected position of hospital admissions clerk was made with due regard to the factors enumerated under 5 U.S.C. § 8115(a). The rehabilitation counselor indicated that the position paid \$193.60 per week in the open market, and appellant's compensation was accordingly reduced to reflect such wage-earning capacity under the principles set forth in *Shadrick*.⁸

⁵ Gary R. Sieber, 46 ECAB 215 (1994).

⁶ In a brief report dated May 4, 1994, Dr. Easter indicated that appellant remained disabled and that appellant reported limitations of standing and sitting. Dr. Easter did not provide an explanation for his conclusion in this progress report.

⁷ See generally *Melvina Jackson*, 38 ECAB 443, 449 (1987). Further, the fact that a claimant may not be successful in obtaining jobs in the selected position does not establish that the work is not reasonably available in the area. See *Samuel J. Chavez*, 44 ECAB 431 (1993).

⁸ *Supra* note 4.

The decisions of the Office of Workers' Compensation Programs dated January 20, 1995 and October 19, 1994 are affirmed.

Dated, Washington, D.C.
August 21, 1998

George E. Rivers
Member

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member